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Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 395.

C. P. DEWEY,

Plaintiff in Error,

vs.

CITY OF DES MOINES, C. H. DILWORTH, COUNTY TREASURER OF POLK COUNTY, AND DES MOINES BRICK MANUFACTURING COMPANY,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

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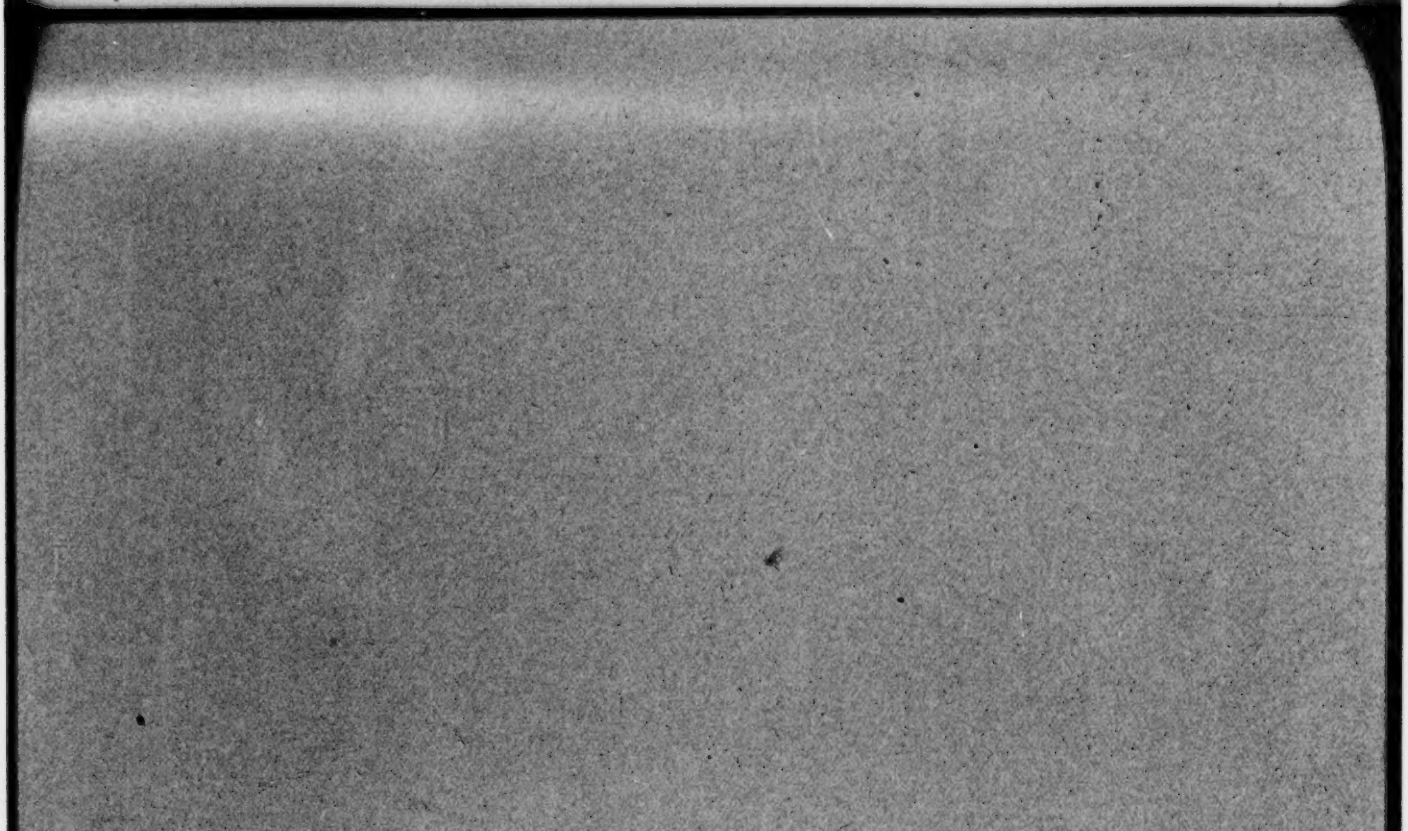

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

C. P. DEWEY,
Plaintiff in Error,

vs.

CITY OF DES MOINES, C. H. DILWORTH, County Treasurer of Polk County, and DES MOINES BRICK MANUFACTURING COMPANY,
Defendants in Error.

No. 395.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA—BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

We follow substantially the plaintiff in error's statement of facts in the supreme court of Iowa.

In the year 1888 C. P. Dewey, the plaintiff in error, who was then and now is a citizen of the state of Illinois, residing in Chicago, became the owner of sixty lots situated in the county of Polk, state of Iowa, and near to but outside the then corporate limits of the city of Des Moines.

By provisions of chapter one of the laws of 1890, (Record Page 11,) the territory in which these lots were situatdd was annexed to the city of Des Moines. (See Record, Page 15.) About one year after said annexation the city couucil of the city of Des Moines passed certain resolutions providing for the paving and curbing of a street called East Grand Avenue. (Page 2, Record.) Said resolutions were as follows:

"It is hereby declared necessary that East Grand Avenue from Eighteenth street to the State Fair Grounds be improved by paving and curbing."

"That the board of public works be instructed to advertise for bids for curbing and paving East Grand Avenue from Eighteenth street to the State Fair Grounds, the same to be curbed with artificial stone and paved with brick."

The lots belonging to plaintiff abut directly upon the said East Grand Avenue thus ordered to be paved, he having thirty situated upon the north side of the said street and thiry lots situated upon the south side of the said street, each lot having a frontage of forty feet and an average depth of one hundred thirty-seven and one-half feet. March 15, 1892, the said council of the city of Des Moines entered into a contract for the paving and curbing of the said street, (Record Page 16) and the work was actually done. When the work was completed there was assessed against each of said lots the sum of $148.80, the cost of paving alone, and against the entire sixty lots the sum of $8,928.00, which sum with ten per cent interest added amounted at the time of the decree to be hereinafter mentioned to the sum of $11,655.50. By the terms of the certificates which were issued to the contractors the sum specified, that is to say $148.80 for each lot, was as-

sessed against the lots and also against the plaintiff in error, the owner, as a personal debt. On the 30th day of April, 1894, the plaintiff in error began a suit in equity in the district court of Polk county, Iowa, having for its object the setting aside of said special assessment for paving. The certificates which had been issued to the contractors for doing the work had been assigned to the Des Moines Brick Manufacturing Company, one of the defendants in said suit. Said brick company filed a counterclaim against the plaintiff in error, and the lots in question, to foreclose the certificates. (Record, Pages 18-23.) As will be shown later, the allegations in the plaintiff's bill were by demurrer and stipulation admitted to be true. We cannot better describe the exact grievance of the plaintiff in error in his suit than by quoting in full paragraph six of his bill in the district court, which is as follows:— (Record, Pages 3, 4, 5.)

"That the resolution to have said street and the order directing said work to be done were oppressive, collusive, fraudulent and void. That in the year 1886 the highway now called East Grand Avenue was laid out and opened under the order and directions of the board of supervisors of Polk county, Iowa. That said highway was laid out and opened one hundred feet wide and was at that time in a fair condition for public travel. That said highway between the points designated in the resolution of the city council as Eighteenth street on the west and the fair grounds on the east was worked and improved between 1886 and April, 1890, so that it became a first-class country road and was traversed largely by vehicles passing from the city to the State Fair Grounds and returning, during the four years last mentioned. That in 1886 the fair grounds of the State Agricultural Society of Iowa were established about one mile east of the eastern limits of the city of Des Moines as then established, and that said high-

way now known as East Grand Avenue was thereafter largely used and traveled in reaching said fair grounds and there was no compiaint or objection to such roadway, except that it was somewhat dusty in dry weather.

"That in the year 1890, when the attempt was made to extend the eastern limits of the city of Des Moines two and one-half miles farther to the east, as hereinafter set out, the directors of the State Agricultural Society solicited the city council of Des Moines to cause East Grand Avenue to be curbed and paved from Eighteenth street, being near the eastern limit of said city before such annexation, eastward to the State Fair grounds, the reason assigned being the great benefit which would accrue to said State Agricultural Society in holding its annual State fair. That there was no real necessity for paving or curbing said street between Eighteenth street and the State Fair Grounds, so far as the property or interests of persons residing or owning property along said street were concerned. *That the distance between the points just mentioned is something over one mile, but in that entire distance and on both sides of said street there are now only four small and inexpensive houses, and some of them were not built when the street was ordered improved in 1891. That along said street on both sides, between the points just mentioned, there are no stores, shops, factories or buildings of any description whatever, except only the four small dwelling houses just mentioned; and the owners of said four impro lots were opposed to the paving of the street.* That all th property owners on both sides of said street, between Eighteenth street and the State Fair Grounds, were opposed to the paving and curbing of said street at the expense of abutting property, and many of said owners protested to the city authorities against such improvement; but that said city council at the solicitation and sole instance, and for the benefit alone of the State Agricultural Society and

its directors, *when there was no actual necessity or real occasion therefore otherwise*, passed said resolutions of necessity and ordered said work to be done, and approved and accepted said work, and levied said tax, and is now seeking to enforce the same against the property of the plaintiff and of others abutting upon said street. And plaintiff alleges that the State Agricultural Society, a private corporation under the laws of Iowa, holds a fair on its grounds lying immediately east of Twenty-eighth street in such alleged extended limits of said city, on or about the first week of September in each year; that large numbers of people visit such fair each year from all sections of the state, and that East Grand Avenue is and has been the most direct and convenient highway to said fair grounds for wagons, horses and cattle and persons having them in charge. That under the circumstances aforesaid, and at the solicitation of the directors of said State Agricultural Society, the said city council, *desiring to aid said Agricultural Society, and well knowing that the paving of said highway was unnecessary except alone for the purpose aforesaid, and well knowing that such paving would be of no benefit to the owners of abutting property and was unnecessary for any city use or purpose, or for the use or purpose of the people living along said street or living in any other portion of the city, and also well knowing that the cost of the paving alone* (which was ordered to be paved forty-two feet in width along said street), aside from the cost of curbing and sidewalks, *would largely exceed the market value of abutting lots one hundred and fifty feet in depth*; knowing all these matters, nevertheless, the said city council, fraudulently and collusively and oppressively, and to the great oppression and wrong of plaintiff and other owners of abutting property along said street, ordered the same to be curbed and paved as aforesaid and caused said work to be done, and assessed the entire cost thereof against the owners of abutting property along said street."

The plaintiff in error had no actual notice or knowledge of the resolution of the city council to pave said street, or said improvement until after the completion and acceptance of the work, nor did he have any such notice or knowledge until he applied to the county treasurer of Polk county for a statement of the general taxes upon his said property in the month of March, 1894. In the bill of plaintiff in error there is the further allegation in paragraph six:

"That the amount of said tax is greater than the reasonable market value of said lots, whether considered singly or together; the assessment against each particular lot being greater in amount than the value of such particular lot, and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together; and that said defendants are seeking to enforce as against plaintiff not merely a sale of said lots, but also to compel plaintiff to pay the full amount of said tax regardless of whatever sum said lots may be sold for, and regardless of the actual value of the same."

As before stated the Brick Company filed an answer and counter-claim being based upon the above certificates issued to the contractors in payment for the work. There was no denial in the answer of the matters alleged in the petition which are now relied upon and the averments of the counter-claim were controverted by the reply filed by plaintiff in which the matters pleaded in the petition are in substance repeated as the defense thereto. The Brick Company then filed a motion to strike out as presenting no cause of action in favor of the plaintiff, nor in defense as against its counter-claim. (Record, Pages 26, 27, 28, 29). By the stipulation filed in the case it was agreed that the motion to strike should be given the same effect as a demurrer to the paragraphs and portions of paragraphs

assailed by said motion as amended and qualified by the stipulation. The motion to strike which was sustained by the court struck out every material allegation in the petition and reply, conceeding them to be true in fact, but adjudging each and all of them to be insufficient in law to afford plaintiff any relief as against the assessment in question. The defendants, the city of Des Moines and C. H. Dilworth, treasurer, demurred to the bill on the general equitable ground that the facts stated therein did not entitle plaintiff to the relief demanded, or to any relief whatever, and the demurrer was sustained.

It is of no consequence whether the case is presented upon the general demurrer to the petition filed by the city of Des Moines and treasurer, or upon the motion to strike filed by the Brick Company. By the terms of said stipulation (Record, Pages 29, 30), the plaintiff's bill and his reply to the counter-claim of the Brick Company were so modified as to eliminate therefrom the allegations as to actual fraud and collusion, and to substitute an allegation of fraud in law instead of an allegation of fraud in fact. In other words that the said authorities and the contractors knew of the facts stated in the pleadings on behalf of plaintiff, and ordered the contract and improvement solely to facilitate travel along East Grand Avenue to the State Fair Grounds, but they had no fraudulent intention in fact in ordering the paving of the street or in doing the work, under the circumstances above stated. Upon the trial of the case in the district court no evidence was adduced except the introduction and filing of the certificates sued upon under the cross-petition, and the case was submitted to the court upon the pleadings and stipulation above mentioned. The court gave to the Brick Company a decree on November 18, 1895, against the plaintiff in error for $11,655.50 and the petition of the plaintiff in error was dismissed on the merits as to the

other defendants. (Record, Pages 30-32). By the provisions of the decree the plaintiff in error is made personally liable for the payment of the total assessment, regardless of the value of the property, the provisions upon that subject in the decree being as follows:

"It is therefore considered, adjudged and decreed that defendant, Des Moines Brick Manufacturing Company, have and recover from the plaintiff, C. P. Dewey, the sum of $11,655.50, with interest thereon from the 18th day of November, 1895, (being amount of said special assessments with interest from the date of the assessment at the rate of ten per cent per annum and a collection fee equal to five per cent of said assessment and interest), and in addition thereto the costs of this action as taxed by the clerk."

After providing for a sale of the lots to satisfy the aforesaid judgment, the decree then proceeds:

"It is further ordered and adjudged that for balance of said judgement, interest or costs remaining unsatisfied after return of said special execution, a general execution shall issue against the plaintiff."

The plaintiff in error appealed to the Supreme Court of the state of Iowa, and among others, made the following assignment of error: (Record, Page 33).

"The court erred in holding and deciding that plaintiff was personally liable to said Des Moines Brick Manufacturing Company for so much of said special tax or assessment as could not or would not be realized by a sale of the sixty lots in question on special execution, and in ordering and adjudging that a general execution should

issue against plaintiff and in favor of said Des Moines Brick Manufacturing Company for the balance of such tax or assessment; and further that, as plaintiff was at all times a non-resident of the state of Iowa and had no personal notice or knowledge of the assessment proceedings, that the imposition of a personal liability against him, in excess of the value of all the lots, was not due process of law and was in contravention of the provisions on that subject of the fourteenth amendment to the constitution of the United States, as well as in contravention of the provisions of the constitution of the state of Iowa on the same subject."

Upon the hearing in the said Supreme Court the decree and judgement of the District Court of Polk county was in all things confirmed, whereupon the plaintiff in error brings his cause to this court for relief.

UNDER THE FACTS SHOWN IN THE RECORD THE ASSESSMENT OF THE ENTIRE COST OF PAVING EAST GRAND AVENUE UPON THE ABUTTING PROPERTY OF THE PLAINTIFF AND OTHERS, AMOUNTS TO THE TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION, AND IS THEREFORE A DENIAL OF THAT "DUE PROCESS OF LAW" WHICH IS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Before entering into the discussion of the above proposition I will briefly recapitulate the most salient and pertinent facts shown by the record. It is admitted by the pleadings together with the stipulation that the

assessment was made at the special instigation of the said State Agricultural Society of Iowa.

That there was no particular need of said paving for general public purposes.

That to increase the comfort and convenience of citizens desiring to attend the State Fair each year said paving was ordered and the costs thereof assessed entirely upon the abutting property owners.

That none of the owners of said abutting property desired said improvements, but on the contrary many of them having knowledge of the improvement in contemplation protested strongly against it.

That for more than a mile of said street on that part of it on which plaintiff's lots abut there are only four small and cheap houses, and some of them were not built when the paving and curbing was ordered.

That the said council of the city of Des Moines, at the time said work was ordered, well knew that the cost of said work would execcd the value of the property upon which the brunt of paying for said improvements was placed.

That said paving and curbing was ordered solely on account of the supposed benefit which would accrue to the said State Agricultuarl Society in holding its annual State Fair.

That there was no actual necessity for paving or curbing said street so far as the property or interests of persons residing or owning property along said street was concerned.

That by the judgement of the District Court, which was in all things affirmed by the Supreme Court of Iowa, the cost of paving and curbing the street fronting upon the lots belonging to plaintiff in error was made a personal judgement against him, thus appropriating the entire property and providing for a general execution against plaintiff in error to recover whatever deficiency there should be after selling his lots.

The counsel for plaintiff in error in the State Court seem to have relied upon one single proposition only as involving a Federal question, to-wit: "As plaintiff was at all times a non-resident of the state of Iowa, and had no personal notice or knowledge of the assessment proceedings, that the imposition of the personal liability against him in excess of the value of all the lots was not due process of law and was in contravention to the provisions on that subject of the fourteenth amendment to the constitution of the United States."

The writer can discover no reason for thus limiting and narrowing down this constitutional Federal question to the mere fact that the plaintiff in error was a non-resident of the state of Iowa, an dhad no personal notice or knowledge of the assessment proceedings, and that the imposition of the personal liability against him *in excess of the value of all the lots* was not due process of law. While the fact that the plaintiff in error did not actually have notice of the contemplated imposition of an assessment lien upon his property, may be, and doubtless is, of some importance, still in the writer's opinion it is but a minor issue. It is in fact of small importance for the purposes of this discussion whether the plaintiff in error was a citizen of Iowa or Illinois, whether he had, or did not have, notice of the pendency of the assessment proceedings. The mere fact that the city council has made an assessment

upon his property which it knew at the time of the making of the same, exceeded in cost the fair market value of the property to be assessed was a violation of the fourteenth amendment to the constitution of the United States. While it may be that this court would not inquire into the proportion or extent to which property has been benefitted by local improvement, and will not interfere when the sole question is to what extent the abutting property has been benefitted, I think it ought, and will, declare that an assessment for local improvements equal to or exceeding the actual value of the property assessed is a gross violation of the very principle upon which all assessments are based, to-wit, the increased value caused thereby to the abutting property, and that it constitutes the taking of private property for public use without compensation.

In DILLON ON MUNICIPAL CORPORATIONS, third edition, section 761, will be found the following statement of the law:

"Special benefits to the property assessed, that is benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest, and to the extent of special benefits it is everywhere admitted that the legislature may authorize local taxes or assessments to be made. Local improvements can be assessed upon particular property only to the extent that it is specially and peculiarly benefitted, and since the excess beyond that is a benefit to the municipality at large it must be born by the general treasury."

To the same effect is the ruling of Mr. Justice Sharswood in Hammett vs. Philadelphia, 665 Pa., R. 146:

"Local assessments can only be constitutional when imposed to pay for local improvements clearly conferring special benefits upon the property assessed, and to the extent of these benefits ; they cannot be imposed when the improvement is either expressed or appears to be for the generel benefit."

We would not go to the extent of claiming that an assessment which nearly equals the value of the property assessed, and which exceeds the benefits conferred upon the abutting property would necessarily furnish a case for the interposition of this court on the ground that there had been a denial of due process of law, however obnoxious such an assessment would be to general principles of law, but when it is admitted, as in this case, that the imposition of the assessment amounts to the confiscation of the entire property which the plaintiff in error has in the abutting lots, it is clearly taking of private property for public use without compensation and therefore a denial of due process of law, and a case deserving of relief from this court.

We cite authorities sustaining the doctrines laid down in Dillon's Municipal Corporations, as follows :

City of Raleigh vs. Peace, 14 *S. E.*, 521.
Cain vs. Commissioners, 71 *N. C.*
Cooleys Constitutional Limitations, *Sec.* 506.
1st Hare American Constitutional Law, 286 *to* 315.
Elliott on Roads and Streets, 369, 370 *and* 371.
Higgins vs. Ausmuss, 77 *Mo.*, 351.
Neenan vs. Smith, 50 *Mo.*, 525.
Macon vs. Patty, 57 *Miss.*, 378.
Craw vs. Tolons, 96 *Ill.*, 255.
Gaffney vs. Gaugh, 36 *Cal.*, 104.
Baptist Church vs. McAtee, 8 *Bush*, 508.

Burlington vs. Quick, 47 *Iowa*, 226.
Green vs. Ward, 82 *Va.*, 324.
Louisiana vs. Miller, 66 *Mo.*, 457.
Virginia vs. Hall, 96 *Ill.*, 278.
Taylor vs. Palmer, 31 *Cal.*, 240.
Seattle vs. Yerter, 1 *Wash. Ter.*, 576.
Thomas vs. Gains, 35 *Mich.*, 155.
Crawford vs. People, 82 *Ill.*, 557.
Waterpower Company vs. Green Bay, etc., etc., 142 *U. S.*, 254.

But this amazing decree of the Iowa court is not satisfied, and does not stop, with the appropriation and virtual confiscation of all of the plaintiff in error's interest in his said lots, and notwithstanding the fact that the record shows that the lots were not sufficient in value to pay for the cost of the improvement, the court orders the sale of the lots, judicially knowing that the proceeds would fall far short of paying in full the cost of assessment made against said lots, and decreed that after the application of the proceeds of said lots a general execution should run against the property of the defendant wherever found in the jurisdiction of the said courts of Iowa which carried with it the right to sue upon said judgment in the courts of Illinois, where the plaintiff in error resides, or in any other state where he has property, and having obtained a judgment thereupon to levy upon any property of the plaintiff in error which might be situated therein.

A perusal of the opinion of the Supreme Court of Iowa shows that that court, while not attempting to evade the force of these facts, nor denying the resulting hardships, contends that this taking of the property of the plaintiff in error does not amount to a denial of due process of law, and holds that he is without remedy. It is clear that said court relies upon the case of *Davidson* vs. *New Orleans*, 96 U. S., 97, to sustain its position.

It must be admitted that certain portions of the opinion of Mr. Justice Miller in this case seem to justify the interpretation placed upon it by the Supreme Court of Iowa, and had not this court in a later decision unmistakably expressed a contrary doctrine, we would feel that our only hope for success in this case would rest upon the presumptuous expectation of obtaining a reversalby this court of its decision in *Davidson* vs. *New Orleans.* I will quote briefly the two paragraphs mentioned. On page 105, 96 U. S., the opinion says:

"If private property be taken for public uses without just compensation, *it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken.* It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were setting in review of a Circuit Court of the United States, as we were in *Loan Association vs. Topeka* (20 Wall. 655). But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

And on page 106 the opinion says:

"And lastly, and most strongly, it is urged that the court rendered a personal judgement against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force, and some highly respectable authorities are cited to support the proposition,

that while for such improvements as this a part, or even the whole, of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it. If this were a proposition coming before us sitting in a State court, or, perhaps, in a Circuit Court of the United States, we might be called upon to decide it; but we are unable to see that any of the provisions of the Federal Constitution authorizes us to reverse the judgement of a State Court on that question. *It is not one which is involved in the phrase "due process of law,"* and none other is called to our attention in the present case."

We have studied these two paragraphs very carefully, and we can extract from them no other suggestion except that the distinguished jurist said, that, because that provision in the fifth amendment of the constitution of the United States forbidding the taking of private property for public use without compensation was omitted from the fourteenth amendment, therefore such a prohibition was not operative upon the several states, and second, that the taking of private property for public use without compensation is not a denial of true process of law, and therefore in such a case there was nothing in the record raising a Federal question. In view of the great mass of respectable authorities to the contrary on this question we cannot but think that the language quoted was inadvertently used and was not intended to express the views which its plain import would convey. Indeed it would seem that Mr. Justice Bradley in his concurring opinion does not give the construction to the language of Mr. Justice Miller that is given to it by the Supreme Court of Iowa, and which we admit may fairly be given, for he says on page 107, 96 U. S. :

"It seems to me that private property may be taken

by a state without due process of law in other ways than by mere direct enactment, or the want of a judicial proceeding. If a state, by its laws, should authorize private property to be taken for public use without compensation (except to prevent its falling into the hands of an enemy, or to prevent the spread of a conflagration, or, in virtue of some other imminent necessity, where the property itself is the cause of the public detriment), I think it would be depriving a man of his property without due process of law. The exceptions noted imply that the nature and cause of the taking are proper to be considered. The distress warrant issued in the case of *Murray's Lessee et al.* vs. *Hoboken Land and Improvement Co.* (18 How. 272) was sustained, because it was in consonance with the usage of the English government and our state governments in collecting balances due from public accountants, and hence was 'due process of law'. But the court in that case expressly holds that 'it is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial, power of the government, and cannot be so construed as to leave Congress free to make any process, due process of law, by its mere will,' p. 276. We think, therefore, we are entitled under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law,' provided by the State law when a citizen is deprived of his property; and that in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissable in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide

modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular State may require."

In this language by Mr. Justice Bradley is contained "all of the law and the prophets."

In the case of *Scott* vs. *City of Toledo*, 36 Fed. Rep., 385, Mr. Justice Jackson, in his admirable and exhaustive discussion of the question we are now considering, did not construe the language of Mr. Justice Miller as conveying the meaning which the Supreme Court of Iowa and the writer has placed upon the excerpts which we have quoted from Mr. Justice Miller's opinion. Mr. Elliott, in his work on Roads and Streets, however, adopts the construction which the Supreme Court of Iowa has adopted, and says in so many words that Mr. Justice Miller has held that the taking of private property for public use without compensation does not constitute a denial of due process of law.

It is not profitable to pursue this branch of the subject any further, in view of the later decisions of this court, and our only excuse for having occupied so much space upon it is to show that the Supreme Court of Iowa evidently denied relief to the plaintiff in error because of the construction it gave to the above quoted language of Mr. Justice Miller. Upon the general question under discussion we beg leave to call the court's attention to the above mentioned case of *Scott* vs. *City of Toledo*, 36 Fed. Rep., 385. For the convenience of the court we will quote liberally from the excellent opinion in that case where all the authorities that we would otherwise quote ourselves, are carefully and effectively marshalled by Mr. Justice Jackson. Commencing on page 391 he says:

"Counsel for complainants, on this branch of the case,

submit for consideration, upon the facts, two leading and general questions of law:

"(1) May a municipal corporation appropriate private property for the purposes of a public highway, and compel the owner thereof to repay to the corporation, by an assessment upon his remaining property, not only the entire amount which it has paid him for the property appropriated, but also the costs and expense of ascertaining that amount, and the damages resulting to such remaining property from the taking of the property appropriated? (2) May private property be appropriated for public uses, and a charge levied to pay therefor, without affording the person whose property is to be charged a time, place, or tribunal where he may be heard, before the liability for such charge is finally established, and the amount thereof definitely fixed?"

"Upon the first proposition it is insisted on behalf of complainants that compensation for private property taken for public uses is an essential element of that 'due process of law' without which the citizen cannot be lawfully deprived of his property. For the defendant it is claimed that 'the fourteenth amendment does not prohibit the taking of private property by a state without compensation;' in other words, that the appropriation of private property for public use, without compensation to the owner is not depriving him of his property 'without due process of law.' Counsel for defendant further say that, 'even if due process of law be held to require compensation, the kind of compensation may still be determined by the state, and, in the absence of express constitutional provision to the contrary, the property may be compensated for in special benefits, and it is clearly within the province of the state to provide for estimating this compensation in any manner which involves due process of law,—that is, notice and a hearing.' We need not pause to consider this latter prop-

osition. It is not material to the present case. It suggests a question not here involved, because it clearly appears from the pleadings, exhibits, and agreed statement of facts that no 'special benefits' will inure to complainants from the appropriation of their property, but, on the contrary, that it will result in damage to their remaining property. It would be an anomaly to say that property is specially 'benefitted' by the same act which damages it. A further reason for not discussing this last suggestion of defendant's counsel as to the right of the state to determine the kind of compensation that shall be awarded the owner for property taken for public use, is found in the fact that the action of the common council of Toledo herein called in question, as counsel for defendant admits, is not an attempt to pay for the property to be appropriated by the benefits resulting to other proporty from the appropriation. If such had been the true character of the proceeding, it would clearly violate the provisions of the state constitution, and, independent of the federal questions involved, would entitle complainants to enjoin its enforcement. The single question is therefore presented, whether, in the taking of private property for public use, 'due process of law' requires that compensation shall be made to the owner for the property so appropriated. In other words, may a state, or any subordinate division thereof, since the adoption of the fourteenth amendment to the constitution of the United States, take the property of its citizen for public purposes without making him compensation therefor? Does 'due process of law,' without which the citizen cannot, under this fourteenth amendment, be deprived of his property by the state, involves as a necessary and essential ingredient the payment or the making of compensation for private property appropriated for public use? This precise question has not yet been passed upon, either by the Supreme Court or the United States or the State courts, so far as we have been able to discover, and it must therefore be considered and determ-

ined upon the general principles applicable to the subject.'

"No attempt will be made to define the exact scope of the terms 'due process of law.' No court has yet succeeded in giving to these words an exact definition applicable to all the varied cases in which they may be involved. The Supreme Court has said (*Davidson* vs. *New Orleans*, 96 U. S., 104) that, instead of attempting to define what constituted 'due process of law,' it was wiser, in ascertaining the extent and application of such an important phrase in the federal constitution, to adopt the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, and thus, by actual application, give to the words their proper meaning. In a general sense, 'due process of law' is identical in meaning with the phrase, 'law of the land,' as used in the constitution of the several states. Cooley, Const. Lim., 432. As applied to the appropriation of private property for public uses under the power of eminent domain, 'due process of law' clearly does not mean mere legislative enactments, nor simple compliance with the forms of law, nor even constitutional provisions, if they be inconsistent with previously established legal rights. Thus in Cooley Const. Lim. 433, it is said:

"'That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense.'"

And again, (at p. 435).

"'The principles, then, upon which the process is based, are to determine whether it is due process or not, and not any consideration of mere form. * * * When the government, through its established agencies, inter-

feres with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. * * * Due process of law, in each particular case, means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

To the same effect is the language of the supreme court in *Davidson* vs. *New Orleans*, 96 U. S., 102, where the court, speaking by Mr. Justice Miller, after explaining the reasons why the phrase 'law of the land' as used in *magna charta*, was not directed against the enactments of parliament, proceeds to say:

"'But when, in the year of grace 1866, there is placed in the constitution of the United States a declaration that no state shall deprive any person of life, liberty or property without due process of law, can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law within the meaning of the constitutional provision.'"

"In this case of *Davidson* vs. *New Orleans*, 96 U. S., 107, Mr. Justice Bradley said:"

"'If a state, by its laws, should authorize private property to be taken for public use, without compensation, * * * I think it would be depriving a man of his property without due process of law. * * * I think, therefore, we are entitled under the fourteenth amendment, not only to see that there is some process of law, but due process of law, provided by the state law, when a citizen is deprived of his property; and that, in judging what is due process of law, respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessments for local improvements, or none of these; and, if found to be suitable or admissable in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law.'"

"In the *Kentucky Railroad Tax Cases*, 115 U. S. 331, 6 Supt. Ct. Rep. 57, this language of Mr. Justice Bradley is quoted with approval by the Supreme Court. It is a fundamental principle of the common law, established and well settled before the adoption of the federal constitution, that the proper and lawful exercise of the sovereign right of eminent domain involves these two essential elements, viz., that the property must be taken for the public benefit, or for public purposes, and that the owner must be compensated therefor. The exercise of the power of eminent domain is, in legal effect, nothing more than an enforced sale, for the public benefit, at a fair price, to be ascertained in a proper mode, and to be paid the owner for the property so appropriated. This long and firmly established principle hardly requires any discussion or citation of authority in its support. It is thus clearly and forcibly expressed by one of the earliest and ablest law writers:"

"'So great, moreover, is the regard of the law for pri-

vate property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man or set of men to do this without consent of the owner of the land. * * * In this and similar cases the legislature alone can, and, indeed, frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price, and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform.' Cooley Bl. bk. 1, p. 137."

"In the same work, (book 2, p. 35, note) on the subject of 'Ways,' it is said:"

"'A public way is established either by the dedication of the owner of the land or by an appropriation of the land for the purpose by the sovereign authority, under what is called the right of eminent domain. When this right is exercised, it must be in pursuance of some express legislative authority which prescribes the formalities, and compensation must be made to the owner.'"

"So, too, in Mills. Em. Dom., § 1, it is said on this subject:"

"'The annals of all nations enjoying a constitutional government, and of many despotic nations, show that the

moral sense of mankind requires such compensation. In the absence of provisions in the constitution, the courts have considered that the principle was so universal and fundamental that laws not recognizing the right of the subject to compensation would be void.'"

These well-recognized principles, vital to the security, and essential to the protection, of the citizen against the arbitrary exercise of power on the part of the government, were in full force at the adoption of the constitution of the United States. They were not, however, fully recognized in that instrument as originally adopted. The fifth amendment, providing that private property should not be taken for public use without just compensation, was accordingly required for the better security of private property against the power of government. This amendment to the constitution, which recognized and secured to the citizen, as a fundamental principle, the right to compensation for private property taken for public use, was intended as a limitation to the federal power. The first ten amendments to the constitution recognized and secured to all citizens certain rights, privileges, and immunities essential to their security. The fifth amendment operating only as a limitation upon the power of the general government, fell short of giving to the citizen the full protection to which he was entitled in respect to his life, liberty and property, so far as state action was concerned. It imposed no prohibition or limitation upon the power and authority of the states in dealing with the life, liberty and property of the citizen. They were left to the restraints of their several constitutions and respective laws on these subjects. So far as the states were concerned, citizens of the United States were thus left without adequate protection and security in their persons and property. The fourteenth amendment was adopted to remedy and correct this defect in the supreme organic law of the land. It involves no

forced or unreasonable construction to hold that this fourteenth amendment, as applied to the appropriation of private property for public uses, was clearly intended to place the same limitation upon the power of the states which the fifth amendment had placed upon the authority of the federal government. And as Judge Cooley well remarks:

"'Of these amendments it may be safely affirmed that the first ten took from the Union no power it ought ever to have exercised, and that the last three required of the states the surrender of no power which any free government should ever employ.'

"Whatever may have been the power of the states on this subject prior to the adoption of the fourteenth amendment to the constitution it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner; and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the state, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that due process of law required by said amendment. The conclusion of the court on this question is that since the adoption of the fourteenth amendment compensation for private property taken for public uses constitutes an essential element in due process of law, and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure

it is taken, would violate the provisions of the federal constitution. 'There is no difference in the principle between the case put by Mr. Justice Miller, as an illustration, in *Davidson* vs. *New Orleans*, 96 U. S., 102, viz., the taking of property from A. and vesting it in B., and the taking of property from an individual and vesting it in the public. 'Due process of law' is equally wanting in both cases; in the latter case, because such a taking, without making compensation to the owner, is nothing short of legalized robbery, or confiscation for the benefit of the public. If, therefore, the statutes of Ohio, whether in harmony with the state constitution or not, authorize the city of Toledo to appropriate the property of complainants for the purpose of a public highway, and to do this in a way which will not only exempt it from duty and obligation of compensating them for the property taken, but imposes upon complainants themselves, under the form of an assessment by the foot front, the burden of compensating themselves or of returning to the city all they may be entitled to receive as compensation for their property, such statutes are wanting in that 'due process of law' required by the federal constitution; and the attempted proceedings had thereunder by the common council of Toledo are void, so far at least, as said assessment is concerned.',

We apprehend, however, that the question whether the taking of private property for public use without compensation is a denial of due process of law is definitely settled by the decision of this court in the case of *Chicago, B. & Q. Co.* vs. *City of Chicago*, 166 U. S., page 226, where the question receives the most careful and exhaustive treatment. In the fourth sub-division of the syllabus in that case it is said:

"A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state,

or under its direction for public use, without compensation made or secured to the owner, is wanting in the due process of law required by the fourteenth amendment, and the affirmance of such a judgment by the highest court of the state is a denial by the state of a right secured by the constitution.".

In the opinion in this case the leading authorities upon this subject are cited, and nothing further is left to be said.

Having disposed of that part of this case which goes to the jurisdiction of this court on the ground that the taking of private property for public use constitutes a denial of due process of law it only remains to discuss the question whether or not there has actually been such denial in the case at bar, and whether the record in this case shows that the property of the plaintiff in error has been actually taken for public use without compensation.

It was contended by counsel for plaintiff in error in the State court that the Iowa Agricultural Society is a private corporation. If this is true, then we have a case involving the taking of private property for private use, which if possible is more obnoxious to the "law of the land" than the taking for public use. As far as the principle at stake is concerned it matters not which view we take of the status of the Agricultural Society in this respect. *White* vs. *White*, 5 Barbour, 484, 485. Had the plaintiff in error not executed and delivered an approved supersedeas bond, long before this, doubtless, his sixty lots would have been sold to raise money to apply on the judgment against him for paving assessment. By the stipulation and demurrer it is conceded that said lots, if sold at their fair market value, would not have brought enough to pay the judgment.

This fact then is certain, the plaintiff in error would have been deprived of the entire ownership of his property. Now who did this act of alienation? It cannot be conceived that any one will claim that the plaintiff in error himself did it. The only answer possible to be made is that the plaintiff in error was deprived of his property by force of a contract made and enforced by the city council of the city of Des Moines.

The plaintiff in error has, without any fault or act of his own, been totally divested of his ownership. What compensation has he received? Who will have the hardihood to say that he has received, or in any manner can receive, directly or indirectly, a single farthing? Leaving out of sight that enormity, the personal judgment for a general execution to collect the deficiency, no subtlety of casuistry can cover up the fact that he has received, and will receive no compensation. Having received no compensation for this spoilation of his property, what benefit has the plaintiff in error received? The record does not show that he owns any other real estate in the vicinity of Des Moines, and we think it is a fact that he does not. The only benefit that can possible be conceived is on the theory that the plaintiff in error is a self-denying philanthropist who receives delight in knowing that the good people of Polk county, Iowa, do not have to drive in the mud for at least one mile on their annual pilgrimages to the State Fair.

If the paving was not a wanton expenditure without use or benefit to any one, it follows that the general public and the State Agricultural Society are the sole beneficiaries. The only constitutional ground for imposing any lien on the lots of the plaintiff in error is totally lacking in this case. I quote from the opinion of Mr. Justice Shepperd, in *City of Raleigh* vs. *Peace*, 14 S. E., 525, (N. C.):

"We are of the opinion, however, that no personal judgment can be rendered against the abutting owner, and that so much of the amendment to the charter which provides for such a judgment is invalid. It is true that in *Wilmington* vs. *Yopp*, supra, such a judgment was rendered, but the point was not presented and passed upon by this court; the only question decided being the validity of special assessments of this character, and not the manner of their enforcement. We feel at liberty, therefore, to examine into the constitutionality of the act authorizing the judgment in question; and in doing so we cannot better express our views than by quoting the language of Mr. Elliott: 'It is not easy to perceive how the assessment can extend beyond the property against which it is directed, since the sole foundation of the right to direct and enforce the assessment rests upon the theory that the land receives a benefit equal to the assessment. If the land, with the super-added value given to it by the improvement, will not pay the assessment, there is no constitutional warrant for the right to seek payment of the assessment elsewhere, for the land is all that the improvement can by any possibility benefit, and land (or other property) that is not benefitted can not be seized without violating the principle which forbids the taking of property without compensation, nor without breaking down the only theory upon which it is possible to sustain local assessments, and yet if there is a personal liability the assessment may be enforced, although the land, even as enhanced in value by the improvement, may not be worth a tithe of the extent of making the improvement. * * * The decisions which declare statutes imposing a personal liability upon the land-owner unconstitutional are, in our judgment, so strongly entrenched in principle that they cannot be shaken.' Elliott, Roads and S., 400. Such, also is the opinion of Judge Cooley, (Taxation, 675,) who says that 'in such a case, if the owner can have his land taken from

him for a supposed benefit to the land which, if the land is sold for the tax, it is thus conclusively shown he has not received, and he is then held liable for a deficiency in the assessment, the injustice—not to say the tyranny—is manifest. But such a case is liable to occur if assessments are made a personal charge; and cases like it in principle, though less extreme in the injury they inflict, are certain to occur.' The foregoing reasons are entirely conclusive to our minds, and are well sustained by authority.

"*Higgins* vs. *Ausmuss*, 77 Mo., 351.
Neenan vs. *Smith*, 50 Mo., 525.
Macon vs. *Patty*, 57 Miss., 378.
Craw vs. *Tolono*, 96 Ill., 255.
Gaffney vs. *Gough*, 36 Cal., 104.
Baptish Church vs. *McAtee*, 8 Bush, 508.
Burlington vs. *Quick*, 47 Iowa, 226.
Green vs. *Ward*, 82 Va., 324."

The third assignment of error by the plaintiff in error is as follows, record page 47:

"Third. That the said judgment is not sustained or procured by due process of law, for the reason that the Supreme Court of Iowa, in case of state *ex rel. West* vs. *City of Des Moines*, 65 N. W. Rep., 818, has formally adjudged and decreed that the act of annexation under and by authority of which said paving tax was assessed is unconstitutional and void, of which judgment this court will take judicial notice, and therefore all acts of the city officers by virtue of said statute are void."

In the case, above mentioned, the Supreme Court of Iowa held that the act under which the boundaries of the city of Des Moines were extended was void, because, although the act was drawn in the guise of a general law,

it was in fact a special law for the reason that the city of Des Moines was the only city in the state of Iowa that possessed the conditions required by the act. If the act was void it seems impossible that the ordinances of the city council of Des Moines extending the boundaries of the city, under the void act, could have any vitality or validity. The stream cannot rise higher than its source. It seems to the writer that if this court will take judicial notice of the above mentioned decision of the Supreme Court of Iowa the record shows that there was neither "due," nor in fact any process of *law* in the proceedings upon which the assessment was founded.

It is true that the Supreme Court of Iowa hold that by laches the state or any individual is estopped from attacking the validity of the subsequent act of corporation, or the validity of indebtedness contracted for improvements made thereunder, but this was grounded on doubtful expediency which is not binding on this court. The decision of the highest court of the state of Iowa holding that the act of the legislature providing for annexation is void, would probably be binding on this court, but the policy of expediency annonnced by the court to avoid the logical and necessary results of its decision is not binding on this court, nor do we believe it is sustained by either authority or good reason

Sutro vs. *Pettit*, 74 Cal., 332.

Were not other questions which seem to be decisive of this case presented by the record, which have been fully discussed, it might be desirable to enter into a more extended discussion of this point, but as the case stands we do not feel justified, nor is it necessary to take up the further time of the court.

Respectfully submitted,

AMASA COBB

ANDREW E. HARVEY

No. 192

Brf. of Cobb & Harvey for P. E.

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Dec. 2, 1898.

No. 192.

C. P. DEWEY, PLAINTIFF IN ERROR,

vs.

CITY OF DES MOINES, C. H. DILWORTH, COUNTY TREASURER OF POLK COUNTY, AND DES MOINES BRICK MANUFACTURING COMPANY.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

AMASA COBB,
ANDREW E. HARVEY,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

C. P. DEWEY,
Plaintiff in Error,
vs.
CITY OF DES MOINES, C. H. DILWORTH, County Treasurer of Polk County, and DES MOINES BRICK MANUFACTURING COMPANY,
Defendants in Error.

No. 395.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA—BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

We follow substantially the plaintiff in error's statement of facts in the supreme court of Iowa.

In the year 1888 C. P. Dewey, the plaintiff in error, who was then and now is a citizen of the state of Illinois, residing in Chicago, became the owner of sixty lots situated in the county of Polk, state of Iowa, and near to but outside the then corporate limits of the city of Des Moines. By provisions of chapter one of the laws of 1890, Record Page 11,) the territory in which these lots

were situated was annexed to the city of Des Moines. (See Record, Page 15.) About one year after said annexation the city council of the city of Des Moines passed certain resolutions providing for the paving and curbing of a street called East Grand Avenue. (Page 2, Record.) Said resolutions were as follows:

"It is hereby declared necessary that East Grand Avenue from Eighteenth street to the State Fair Grounds be improved by paving and curbing."

"That the board of public works be instructed to advertise for bids for curbing and paving East Grand Avenue from Eighteenth street to the State Fair Grounds, the same to be curbed with artificial stone and paved with brick."

The lots belonging to plaintiff about directly upon the said East Grand Avenue thus ordered to be paved, he having thirty situated upon the north side of the said street and thirty lots situated upon the south side of the said street, each lot having a frontage of forty feet and an average depth of one hundred thirty-seven and one-half feet. March 15, 1892, the said council of the city of Des Moines entered into a contract for the paving and curbing of the said street, (Record Page 16 and the work was actually done. When the work was completed there was assessed against each of said lots the sum of $148.80, the cost of paving alone, and against the entire sixty lots the sum of $8,928.00, which sum with ten per cent interest added amounted at the time of the decree to be here-

inafter mentioned to the sum of $11,655.50. By the terms of the certificates which were issued to the contractors the sum specified, that is to say $148.80 for each lot, was assessed against the lots and also against the plaintiff in error, the owner, as a personal debt. On the 30th day of April, 1894, the plaintiff in error began a suit in equity in the district court of Polk county, Iowa, having for its object the setting aside of said special assessment for paving. The certificates which had been issued to the contractors for doing the work had been assigned to the Des Moines Brick Manufacturing Company, one of the defendants in said suit. Said brick company filed a counterclaim against the plaintiff in error, and the lots in question, to foreclose the certificates. (Record, Pages 18-23.) As will be shown later, the allegations in the plaintiff's bill were by demurrer and stipulation admitted to be true. We cannot better describe the exact grievance of the plaintiff in error in his suit than by quoting in full paragraph six of his bill in the district court, which is as follows:—(Record, Pages 3, 4, 6.)

"That the resolution to have said street and the order directing said work to be done were oppressive, collusive, fraudulent and void. That in the year 1886 the highway now called East Grand Avenue was laid out and opened under the order and directions of the board of supervisors of Polk county, Iowa. That said highway was laid out and opened one hundred feet wide and was at that time in a fair condition for public travel. That said highway between the points designated in the resolution of

the city council as Eighteenth street on the west and the fair grounds on the east was worked and improved between 1886 and April, 1890, so that it became a first-class country road and was traversed largely by vehicles passing from the city to the State Fair Grounds and returning, during the four years last mentioned. That in 1886 the fair grounds of the State Agricultural Society of Iowa were established about one mile east of the eastern limits of the city of Des Moines as then established, and that said highway now known as East Grand Avenue was thereafter largely used and traveled in reaching said fair grounds and there was no complaint or objection to such roadway, except that it was somewhat dusty in dry weather.

"That in the year 1890, when the attempt was made to extend the eastern limits of the city of Des Moines two and one-half miles farther to the east, as hereinafter set out, the directors of the State Agricultural Society solicited the city council of Des Moines to cause East Grand Avenue to be curbed and paved from Eighteenth street, being near the eastern limit of said city before such annexation, eastward to the State Fair Grounds, the reason assigned being the great benefit which would accrue to said State Agricultural Society in holding its annual State fair. That there was no real necessity for paving or curbing said street between Eighteenth street and the State Fair Grounds, so far as the property or interests of persons residing or owning property along said street were concerned. *That the distance between the points just mentioned is something over one mile, but in that entire distance*

and on both sides of said street there are now only four small and inexpensive houses, and some of them were not built when the street was ordered improved in 1891. That along said street on both sides, between the points just mentioned, there are no stores, shops, factories or buildings of any description whatever, except only the four small dwelling houses just mentioned; and the owners of said four improved lots were opposed to the paving of the street. That all the property owners on bothsides of said street, between Eighteenth street and the State Fair Grounds, were opposed to the paving and curbing of said street at the expense of abutting property,, and many of said owners protested to the city authorities against such improvement; but that said city council at the solicitation and sole instance, and for the benefit alone of the State Agricultural Society and its directors, *when there was no actual necessity or real occasion therefore otherwise,* passed said resolutions of necessity and ordered said work to be done, and approved and accepted said work, and levied said tax, and is now seeking to enforce the same against the property of the plaintiff and of others abutting upon said street. And plaintiff alleges that the State Agricultural Society, a private corporation under the laws of Iowa, holds a fair on its grounds lying immediately east of Twenty-eighth street in such alleged extended limits of said city, on or about the first week of September in each year; that large numbers of people visit such fair each year from all sections of the state, and that East Grand Avenue is and has been the most direct and convenient highway to said fair grounds for wagons, horses and cattle and persons having them in

charge. That under the circumstances aforesaid, and at the solicitation of the directors of said State Agricultural Society, the said city council, *desiring to aid said Agricultural Society, and well knowing that the paving of said highway was unnecessary except alone for the porpose aforesaid, and well knowing that such paving would be of no benefit to the owners of abutting property and was unnecessary for any city use or purpose, or for the use or purpose of the people living along said street or living in any other portion of the city, and also well knowing that the cost of the paving alone* (which was ordered to be paved forty-two feet in width along said street), aside from the cost of curbing and sidewalks, *would largely exceed the market value of abutting lots one hundred and fifty feet in depth;* knowing all these matters, nevertheless, the said city council, fraudulently and collusively and oppressively, and to the great oppression and wrong of plaintiff and other owners of abutting property along said street, ordered the same to be curbed and paved as aforesaid and caused said work to be done, and assessed the entire cost thereof against the owners of abutting property."

The plaintiff in error had no actual notice or knowledge of the resolution of the city council to pave said street, or said improvement until after the completion and acceptance of the work, nor did he have any such notice or knowledge until he applied to the county treasurer of Polk county for a statement of the general taxes upon his said property in the month of March, 1894. In the bill of plaintiff in error there is the further allegation in paragraph six:

"That the amount of said tax is greater than the reasonable market value of said lots, whether considered singly or together; the assessment against each particular lot being greater in amount than the value of such particular lot, and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together; and that said defendants are seeking to enforce as against plaintiff not merely a sale of said lots, but also to compel plaintiff to pay the full amount of said tax regardless of whatever sum said lots may be sold for, and regardless of the actual value of the same."

As before stated the Brick Company filed an answer and counter claim being based upon the above certificates issued to the contractors in payment for the work. There was no denial in the answer of the matters alleged in the petition which are now relied upon and the averments of the counter-claim were controverted by the reply filed by plaintiff in which the matters pleaded in the petition are in substance repeated as the defense thereto. The Brick Company then filed a motion to strike out as presenting no cause of action in favor of the plaintiff, nor in defense of against its counter-claim. (Record, Pages 26, 27, 28, 29). By the stipulation filed in the case it was agreed that the motion to strike should be given the same effect as a demurrer to the paragraphs and portions of paragraphs assailed by said motion as amended and qualified by the stipulation. The motion to strike which was sustained by the court struck out every material allegation in the petition and reply, conceeding them to be true in

fact, but adjudging each and all of them to be insufficient in law to afford plaintiff any relief as against the assessment in question. The defendants, the city of Des Moines and C. H. Dilworth, treasurer, demurred to the bill on the general equitable ground that the facts stated therein did not entitle plaintiff to the relief demanded, or to any relief whatever, and the demurrer was sustained.

It is of no consequence whether the case is presented upon the general demurrer to the petition filed by the city of Des Moines and treasurer, or upon the motion to strike filed by the Brick Company. By the terms of said stipulation (Record, Pages 29, 30), the plaintiff's bill and his reply to the counter-claim of the Brick Company were so modified as to eliminate therefrom the allegations as to actual fraud and collusion, and to substitute an allegation of fraud in law instead of an allegation of fraud in fact. In other words that the said authorities and the contractors knew of the facts stated in the pleadings on behalf of plaintiff, and ordered the contract and improvement solely to facilitate travel a ong East Grand Avenue to the State Fair Grounds, but they had no fraudulent intention in fact in ordering the paving of the street or in doing the work under the circumstances above stated. Upon the trial of the case in the district court no evidence was adduced except the introduction and filing of the certificates sued upon under the cross-petition, and the case was submitted to the court upon the pleadings and stipulation above mentioned. The court gave to the Brick Company a decree on November 18, 1895, against the plaintiff in error for $11,655.50 and the petition of the

plaintiff in error was dismissed on the merits as to the other defendants. (Record, Pages 30-32). By the provisions of the decree the plaintiff in error is made personally liable for the payment of the total assessment, regardless of the value of the property, the provisions upon subject in the decree being as follows:

"It is therefore considered, adjudged and decreed that defendant, Des Moines Brick Manufacturing Company, have and recover from the plaintiff, C. P. Dewey, the sum of $11,655.50, with interest thereon from the 18th day of November, 1895, (being amount of said special assessments with interest from the date of the assessment at the rate of ten per cent per annum and a collection fee equal to five per cent of said assessment and interest), and in addition thereto the costs of this action as taxed by the clerk."

After providing for a sale of the lots to satisfy the aforesaid judgment, the decree then proceeds:

"It is further ordered and adjudged that for balance of said judgment, interest or costs remaining unsatisfied after return of said special execution, a general execution shall issue against the plaintiff."

The plaintiff in error appealed to the Supreme Court of the state of Iowa, and among others, made the following assignment of error: (Record, Page 33).

"The court errod in holding and deciding that plaintiff was personally liable to said Des Moines Brick Manu-

facturing Company for so much of said special tax or assessment as could not or would not be realized by a sale of the sixty lots in question on special execution, and in ordering and adjudging that a general execution should issue against plaintiff and in favor of said Des Moines Brick Manufacturing Company for the balance of such tax or assessment; and further that, as plaintiff was at all times a non-resident of the state of Iowa and had no personal notice or knowledge of the assessment proceedings, that the imposition of a personal liability against him, in excess of the value of all the lots, was not due process of law and was in contravention of the provisions on that subject of the fourteenth amendment to the constitution of the United States, as well as in contravention of the provisions of the constitution of the state of Iowa on the same subject."

Upon the hearing in the said Supreme Court the decree and judgment of the District Court of Polk county was in all things confirmed, whereupon the plaintiff in error brings his cause to this court for relief, and says that the said Supreme Court of the state of Iowa erred in affirming the said decree and judgment of the said district court of Polk county, as set forth in the following assignments of error:

67 In the Supreme Court of the United States, October Term, 1897.

C. P. DEWEY, Plaintiff in Error, v. CITY OF DES MOINES, C. H. DILWORTH, Treasurer of Polk, County, Iowa, and Des Moines Brick Manufacturing Company, Defendants in Error.	Error to Supreme Court of Iowa.

Assignments of Error.

The above plaintiff in error makes the following assignments of error as grounds for review of a certain final judgment in the supreme court of Iowa in the above entitled cause, made and entered at the October, 1896, term of said court, to-wit, on the 7th day of April, 1897, the said court being the highest court of said State of Iowa and the highest and last court of said state to which said cause could be carried by said plaintiff in error.

It appears from the record in said cause, and especially from the pleadings, stipulations, and findings of the trial court therein, that the plaintiff in error is and at all times since the pendency of the proceedings complained of has been a citizen and resident of the city of Chicago, State of Illinois.

That he was and is the owner in fee simple of sixty lots in a certain subdivision called "Central Park," said lots being numbered consecutively from (17) seventeen to (76 seventy-six, inclusive; that said Central Park was surveyed and platted into lots, and said plat filed in the office of the county auditor of Polk county, Iowa, (the county
68 in which said lots are situated), in the year 1886; that when said Central Park was platted and divid-

ed into lots, said lots were situated outside the corporate limits of the city of Des Moines; that by the provisions of chapter one, Acts 23 G. A. of Iowa, 1890, it was claimed that Central park and other territory in the neighborhood, being two and one-half miles eastward of the former boundary of said city, were annexed to and became a part of the city of Des Moines, but the plaintiff in error has at all times maintained that said alleged annexation was illegal and void.

It further appears that in the month of May, 1891, the city council of Des Moines declared that it was necessary to pave and curb East Grand avenue and proceeded by contract to pave and curb East Grand avenue from 18th street to the State fair grounds, that the lots belonging to the plaintiff in error lie abutting to said East Grand avenue; that as his share of the cost of said paving and curbing there was assessed against the said lots of the plaintiff in error the aggregate sum of $8,928.00, whinh was made a lien on said lots; that the plaintiff in error has always refused to pay said assessment, claiming the same to be illegal and void, and on April 30th, 1894, brought a suit in equity in the district court of Polk county to set aside said special assessment for paving and curbing.

Judgment was rendered against the plaintiff in error in the district court, and upon appeal to the supreme court of Iowa the final judgment of said district court was in all things ratified and confirmed by the supreme court of Iowa and became and is in effect the final judgment of said last named court.

It appears by stipulation and demurrer that the defendants in error admitted the following facts:

First. That the plaintiff in error had no actual notice or knowledge of the action of the city council aforesaid until he applied, in 1894, to the county treasurer
69 of Polk county for a statement of his general taxes on said lots, and no constructive knowledge except such as might be offered by publications in newspapers in the city of Des Moines.

Second. That the amount of said taxes for paving and curbing is greater than the reasonable market value of said lots, whether considered singly or otherwise, the assessment against each particular lot being greater in amount than the value of said lot and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together.

Third. That at the time of the making of such assessment the city council of Des Moines well knew that the costs of paving and curbing said street would exceed the market value of the abutting lots owned by the plaintiff in error and others.

Fourth. That the defendants in error are seeking to enforce against the plaintiff in error not merely a sale of said lots, but also to compel him to pay the full amount of said tax, regardless of whatever sum said lots may be sold for and regardless of their actual value.

Fifth. That said paving and curbing *was* ordered

solely on account of the supposed benefit which would accrue to the State Agricultural Society in holding its annual State fair.

Sixth. That there was no actual necessity for paving or curbing said street, so far as the property or interests of persons residing or owning property along said street was concerned.

Seventh. That for more than a mile on said street on that part on which plaintiff's lots abut, there are only four small and cheap houses, and some of them were not built when the paving and curbing was oredred.

Eighth. That along said street, in the space mentioned, there are no stores, shops, factories, or buildings of an description whatever except the four houses mentioned.

Ninth. That all the property-holders on both sides of the street between 18th street and the State fair grounds, a distance of more than a mile, were opposed to the paving and curbing of said street at the expense of the abutting property.

Tenth. That said city council, at the solicitation and sole instance and for the benefit alone of the State Agricultural Society and its directors, when there was no actual necessity or real occasion therefor otherwise, passed said resolutions declaring the existence of a necessity for —, and ordered said paving to be done, and approved and accepted said work, and levied said tax, and is now seek-

ing to enforce the same against the property of the plaintiff in error and of others abutting on said street.

The district court of Polk county, Iowa, by its judgment sustained the validity of said tax and rendered a personal judgment against the plaintiff in error for the sum of $11,655.50, with interest from November 18, 1895, and decreed that for any balance of said judgment remaining unsatisfied after the sale of said sixty lots a general execution shall issue against the plaintiff in error. This judgment and decree was in all respects confirmed by the judgment of the supreme court of Iowa.

In such judgment and decree there is manifest error, in this, to-wit:

First. The levy and enforcement by lien of said paving tax for the sole benefit of the public, upon the property of the plaintiff in error to an amount equal to or exceeding the value of the same is a taking of private property for public use without just compensation, in violation of the fifth amendment of the Constitution of the United States and section 18, article one, of the Constitution of the State of Iowa.

Second. That the imposition of a personal liability
71 against the plaintiff in error for any amount of said tax unsatisfied after the sale of the said lots is not not due process of law, and is in violation of the fourteenth amendment of the Constitution of the United States.

Third. That the said judgment is not sustained or

procured by due process of law, for the reason that the supreme court of Iowa, in the case of State ex rel. West v, City of Des Moines, 65 N. W. Rep., 818, has formally adjudged and decreed that the act of annexation under and by authority of which said paving tax was assessed is unconstitutional and void, of which judgment this court will take judicial notice, and therefore all acts of the city officers by virtue of said statute are void.

Wherefore said plaintiff in error respectfully prays that the said judgment of the supreme court of Iowa against him may be reversed, modified, vacated, or set aside, as may appear to be required by law.

ANDREW E. HARVEY,

Solicitor for plaintiff in Error.

ARGUMENT.

In our argument in this brief in support of our prayer for a reversal of the judgment of the Iowa courts, we will rely upon the following specifications of error:

FIRST: UNDER THE FACTS SHOWN BY THE RECORD, THE ASSESSMENT OF THE ENTIRE COST OF PAVING EAST GRAND AVENUE UPON THE ABUTTING PROPERTY OF THE PLAINTIFF AND OTHERS, AMOUNTS TO THE TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION, AND IS THEREFORE A DENIAL OF THAT "DUE PROCESS OF LAW" WHICH IS GUARANTEED BY THE

FOURTEENTH AMENDMENT TO THE CONSTIUTION OF THE UNITED STATES.

SECOND: THAT THIS RENDITION OF A PERSONAL JUDGMENT AGAINST THE PLAINTIFF IN ERROR FOR ANY AMOUNT OF SAID ASSESSMENT THHT SHALL REMAIN UNSATISFIED, AFTER THE SALE OF SAID LOTS AND THE APPLICATION OF THE PROCEEDS TO THE PAYMENT OF THE SAME, IS A DENIAL OF DUE PROCESS OF LAW, AND IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

THIRD: THAT SAID JUDGMENT AGAINST THE PLAINTIFF IN ERROR WAS RENDERED IN VIOLATION OF LAW FOR THE REASON THAT THE SUPREME COURT OF IOWA IN A CASE HEARD AND DECIDED BY IT ENTITLED STATE EX REL. V. CITY OF DES MOINES, REPORTED IN 65 N. W. REP. 818, HAD FORMALLY ADJUDGED AND DECREED THAT THE ACT OF ANNEXATION UNDER AND BY AUTHORITY OF

WHICH SAID PAVING TAX WAS ASSESSED IS UNCONSTITUTIONAL AND VOID AND THEREFORE ALL ACTS AND ORDINANCES OF THE CITY OFFICERS OF THE CITY OF DES MOINES BY VIRTUE OF SUCH STATUE ARE VOID.

Before entering into the discussion of the above propositions we will briefly recapitulate the most salient facts shown by the record. It is admitted by the pleadings together with the stipulation that the assessment was made at the special instigation of the said State Agricultural Society of Iowa.

That there was no particular need of said paving for general public purposes.

That to increase the comfort and convenience of citizens desiring to attend the State Fair each year said paving was ordered and the costs thereof assessed entirely upon the abutting property.

That none of the owners of said abutting property desired said improvements, but on the contrary many of them having knowledge of the improvement in contemplation protested strongly against it.

That for more than a mile of said street on that part of it on which plaintiff's lots abut there are only four small and cheap houses, and some of them were not built when the paving and curbing was ordered.

That the said council of the city of Des Moines, at the time said work was ordered, well knew that the cost of said work would exceed the value of che property upon which the brunt of paying for said improvements was placed.

That said paving and curbing was ordered solely on account of the supposed benefit which would accrue to the State Agricultural Society in holding its annual State Fair.

That there was no actual necessity for paving or curbing said street so far as the property or interests of persons residing or owning property along said street was concerned.

That by the judgment of the District Court, which was in all things affirmed by the Supreme Court of Iowa, the cost of paving and curbing the street fronting upon the lots belonging to plaintiff in error was made a personal judgment against him, thus appropriating the entire property and providing for a general execution against plaintiff in error to recover whatever deficiency there should be after selling his lots.

The counsel for plaintiff in error in the State Court seems to have relied upon one single proposition only as involving a federal question; to-wit: "As plaintiff was at all times a non-resident of the state of Iowa, and had no personal notice or knowledge of the assessment proceedings, that the imposition of the personal liability against him in excess of the value of all the lots was not due process of law and was in contravention to the provisions on that subject of the fourteenth amendment to the Constitution of the United States.

The writer can discover no reason for thus limiting and narrowing down this constitutional question to the

mere fact that the plaintiff in error was a non-resident of the state of Iowa, and had no *personal* notice or knowledge of the assessment proceedings, and that the imposition of the personal liability against him *in excess of the value of all the lots* was not due process of law. While the fact that the plaintiff in error did not actually have notice of the contemplated imposition of an assessment lien upon the property; may be, and doubtless is, of some importance, still in the writer's opinion it is but a minor issue. It is in fact of small importance for the purposes of this discussion whether the plaintiff in error was a citizen of Iowa or Illinois, whether he had, or did not have, notice of the pendency of the assessment proceedings. The mere fact that the city council has made an assessment upon his property which it knew at the time of the making of the same, exceeded in cost the fair market value of the property to be assessed was a violation of the fourteenth amendment to the Constitution of the United States. While it may be that this court would not inquire into the proportion or extent to which property has been benefitted by local improvement, and will not interfere when the sole question is to what extent the abutting property had been benefitted, I think it ought, and will, declare that ah assessment for local improvements equal to or exceeding the actual value of the property assessed is a gross violation of the very principle upon which all assessments are based, to-wit, the increased value caused thereby to the abutting property, and that it constitutes the taking of private property for public use without compensation.

In DILLON ON MUNICIPAL CORPORATIONS,

third edition, seetion 761, will be found the following statement of the law:

"Special benefits to the property assessed, that is benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest, and to the extent of special benefits it is everywhere admitted that the legislature may authorize local taxes or assessments to be made. Local improvemetns can be assessed upon particular property only to the extent that it is specially and peculiarly benefitted, and since the excess beyond that is a benefit to the municipality at large, it must be born by the general treasury."

To the same effect is the ruling of Mr. Justice Sharwood in Hammett v. Philadelphia, 665 Pa,, R. 146:

"Local assessments can only be constitutional when imposed to pay for local improvements clearly conferring special benefits upon the property assessee, and to the extent of these benefits: they cannot be imposed when the improvement is either expressed or appears to be for the general benefit."

We would not go to the extent of claiming that an assessment which nearly equals the value of the property assessed, and which exceeds the benefits conferred upon the abutting property would necessarily furnish a case for the interposition of this court upon the ground that there had been a denial of due process of law, however obnox-

ious such an assessment would be to general principles of law, but when it is admitted, as in this case, that the imposition of the assessment amounts to the confiscation of the entire property which the plaintiff in error has in the abutting lots, it is clearly taking of private property for public use without compensation and therefore a denial of due process of law, and a case deserving of relief from this court.

We cite authorities sustaining the doctrines laid down in Dillon's Municipal Corporations, as follows:

City of Raleigh v. Peace, 14 S. E., 521.
Cain v. Commissioners, 71 N. C.
Cooley's Constitutional Limitations, Sec. 506.
1st Hare American Constitutional Law, 286 to 315.
Elliott on Roads and Streets, 369; 370 and 371.
Higgins v. Ausmuss, 89 Mo., 3518
Neenan v. Smith. 60 Mo., 525.
Macon v. Patty, 57, Miss., 378.
Craw v. Tolons, 96 Ill., 255.
Gaffney v. Gaugh, 36 Cal., 104.
Baptist Church v. McAlee, 8 Bush., 508.
Burlington v. Quick, 47 Iowa, 226.
Green v. Ward, 82 Va., 324.
Louisiana v. Miller, 66 Mo., 457.
Virginia v. Hall, 96 Ill., 278.
Taylor v. Palmer, 81 Cal,, 240.

Seattle v. Yerter, 1 Wash. Ter., 576.

Thomas v. Gains, 35 Mich., 156.

Crawford v. People, 82 Ill., 557.

Waterpower Company v. Green Bay, etc., 142 U. S., 254.

One of the most valuable cases containing a learned and most satisfactory discussion of this question, is the Tidewater Co. v, Caster, 18 N. J. Equity reports 518. (3 C. E. Greene 526). We quote from the opinion of the court commencing on page 527, which after describing the nature of a statute to provide for the drainage of meadow lands says:

"But looking more closely into the structure and effect of this statute there sppears to be a defect which seems to be both radical and incurable and which must prevent its judicial enforcement The defect alluded to is this: No provision is made for the indemnification of the owner of the land subjected to the operation of this law, in case the expense of the improvement shall exceed the benefits which shall be conferred. The act authorizes the entire expense of drainage to be imposed upon the lands, whether such expense falls below, or rises above, the increase in value which may accrue to the lands by reason of such drainage. In orther words, the cost of the enterprise is to be imposed as a burden on the lands, even though a full equivalent in the way of improvement shall not be given to the land owner. Thus if the cost of drainage shall be

$5.00 an acre, such sum is to be assessed on the land, although such land may not be benefitted more than to the extent of $3.00 an acre. The statute does not require that the apportionment of expense shall be limited, as the maximum rate, by the increase in the value to result from the improved condition of the land. Now, therefore, it seems to me obvious, that if this scheme be carried into effect, in the event of an excess of expenses over benefits, private property, *pro tanto*, will be taken for public use without compensation. Where lands are improved by legislative action, on the ground of public utility, the cost of such improvement, it has been frequently held, may, to a certain degree be imposed on the parties who, in consequence of owning lands in the vicinity of such improvement, receive a peculiar advantage. By the operation of such a system, it is not considered that the property of the individual, or any part of it, is taken from him for the public use, because he is compensated in the enhanced value of such property. But it is clear this principle is only applicable when the benefit is commensurate to the burthen; when that which is received by the land owner is equal or superior in value to the sum exacted, for if the sum exacted be in excess, then to that extent, most incontestably, private property is assumed by the public. Nor, as to this excess, can it be successfully maintained that such imposition is legitimate as an exercise of the power of taxation. Such an imposition has none of the essential characteristics of a tax. We are to bear in mind that this projected improvement is to be regarded as one in which the public has an interest; the

owners of these waste lands have a special concern in such improvements, so far as their lands will be in a peculiar manner benefitted; beyond this, their situation is the same as that of the rest of the community. The consideration for the excess of the cost of the improvement over the enhancement of the property, within the operation of this act, is the public benefit; how, then, upon any principle of taxation, can this portion of the expense be thrown exclusively upon certain individuals? The expenditure of this portion of the cost of the work can only be justified on the ground of benefit to the public. I am aware of no principle which will permit the expenses incurred in conferring such benefit upon the public, to be laid in the form of a tax upon certain persons, who are designated, not indeed by name, but by their description as the owner of certain lands. A legislative act, authorizing the building of a public bridge, and directing the expenses to be assessed on A, B and C, such persons not being in any way benefitted by such structure, would not be an act of taxation, but a condemnation of so much of the money of the persons designated, to a public use. And, precisely in the same way, would an exaction of the cost of these works embraced in the act before us, so far as such cost exceeded the benefit to the lands improved, be an assumption of the money of a few individuals for an end purely public. Nor should it be overlooked, that if the scheme embraced in this act should be put in operation, and the expenses should exceed or equal the value of the land in its reclaimed condition, the enevitable result would be, that the public would acquire the benefits contemplated by the

rescue of the land from its present idleness, but the owner of the land would lose his entire property. Every consideration of equity stands opposed to the admission of such a rule of taxation. Nor do I consider it any answer to this last objection to suggest that there is no probability that the expenses of this improvement will equal the improved value of the land to be affected by it. It is clear that the cost of the work and the value of the land in its altered condition are not easy of estimation. It is certain that many enterprises of a similar character have proved abortive, and have brought great losses upon their projectors, and it is enough therefore to say that the property owner cannot without his consent be made a party in the hazards of such an enterprise. If the assessment to which he is subjected had been restricted so as not to exseed the benefits received by him, he would have run no risk because he could not have suffered any loss. But as this law is framed his land may be taken from him if the expenses of the project require the sacrifice. This, as has been already stated would be in my opinien equivalent to a condemnation of the land without compensation for the public benefit, and as this may result from the natural operations of the statute, I am compelled to conclude that it is unconstitutional and void. Thus far this subject has been treated on general principles and the deduction which has been drawn rests on those ordinary rules of justice which, to a considerable degree, form the basis of the social compact. But the result in this way attained has, it is conceived, the great weight of authority in its favor. In the matter of Canal Street, 11 Wendell, 154.

Chief Justice Savage, referring to a proceeding to open a street in the City of New York. says: 'If this assessment is confirmed and enforced. the owners of the adjacent property must pay beyond the enhanced value of their property, *and all such excess is private property taken for public use without just compensation.*'"

"The following adjudications are also in point in support of the doctrines that in proceedings to effect public improvements, the assessment of expenses on the property in the locality of such improvement, must not exceed the value of the benefit conferred upon the land owner.

"Matter of Fourth Avenue, 3 Wend, 452.

"Matter of Albany Street, 11 Wend, 149.

"Matter of Williams and Anthony Street, 19 Wend, 678.

"Matter of Flatbush Ave., 1 Barb. S. C. R., 286.

"Nichols v. City of Bridgport, 23 Conn., 204.

"It is scarcely necessary to add that if a statute is void which does not provide against the chance that the benefits conferred by the projected improvements may be less than the burden imposed on abutting property owners, an ordinance which provides for improvements, in the face of the admitted fact that the cost of the same will exceed not only the benefits conferred, but the entire value of the abutting property, must certainly be void.

"The latest utterance of this court, touching on this

point, is in Holden v. Hardy, 18 Supreme Court Reporter, 383. We quote the first paragraph of the syllabus:

"Due process of law" implies at least a conformity with natural and inherent principles of justice, and forbids that one man's property or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation, and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense."

But this amazing decree of the Iowa court is not satisfied, and does not stop, with the appropriation and virtual confiscation of all of the plaintiff in error's interest in said lots, and notwithstanding the fact that the record shows that the lots were not sufficient in value to pay for the cost of the improvement, the court orders the sale of the lots, judicially knowing that the proceeds would fall far short of paying in full the cost of assessment made against said lots, and decreed that after the application of the proceeds of said lots a general execution should run against the property of the defendant wherever found in the jurisdiction of the said courts of Iowa which carried with it the right to sue upon said judgment in the courts of Illinois, where the plaintiff fn error resides, or in any other state where he has property, and having obtained a judgment thereupon to levy upon any property of the plaintiff in error which might be situated therein.

A perusal of the opinion of the Supreme Court of Iowa

shows that that court, while not attempting to evade the force of these facts, not denying the resulting hardships, contends that this taking of the property of the plaintiff in error does not amount to denial of due process of law, and holds that he is without remedy. It is clear that said court relies upon the case of Davidson v. New Orleans, 96 U. S. 97, to sustain its position.

It must be admitted that certain portions of the opinion of Mr. Justice Miller in this case seem to justify the interpretation placed upon it by the Supreme Court of Iowa, and had not this court in a later decision unmistakably expressed a contrary doctrine, we would feel that our only hope for success in this case would rest upon the presumptous expectation of obtaining a reversal by this court of its decision in Davidson v. New Orleans. I will quote briefly the two paragraphs mentioned. On page 105, 96 U. S., the opinion says:

"If private property be taken for public uses without just compensation, *it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construeing, was left out, and this was taken.* It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in Loan Association v. Topeka (20 Wall. 655 . But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a

party has, without due process of law, been deprived of his property, when as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

And on page 106 the opinion says:

"And lastly, and most strongly, it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force, and some highly respectable authorities are cited to support the proposition, that while for such improvements as this a part, or even the whole, of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it. If this ware a proposition coming before us sitting in a state court, or, perhaps, in a circuit court of the United States, we might be called upon to decide it; but we are unable to see that any of the provisions of the Federal Constitution authorizes us to reverse the judgment of a State Court on that question. *It is not one which is involved in the phrase, 'due process of law,'* and none other is called to our attention in the present case."

We have studied these paragraphs very carefully, and we can axtract from them no other suggestion except that the distinguished jurist said that, because that provision in the fifth amendment of the Constitution of the United States forbidding the taking of private property

for public use without compensation was omitted from the fourteenth amendment, therefore such a prohibition was not operative upon the several states, and second, that the taking of private property for public use without compensation is not a denial of true process of law, and therefore in such a case there was nothing in the record raising a federal question. In view of the great mass of respectable authorities to the contrary on this question we cannot but think that the language quoted was inadvertently used and was not intended to express the views which its plain import would convey. Indeed, it would seem that Mr. Justice Bradley in his concurring opinion does not give the construction to the language of Mr. Justice Miller that is given to it by the Supreme Court of Iowa, and which we admit may fairly be given, for he says on page 107, 96 U. S.:

"It seems to me that private property may be taken by a state without due process of law in other ways than by mere direct enactment, or the want of a judicial proceeding. If a state, by its laws, should authorize private property to be taken for public use without compensation except to prevent its falling into the hands of an enemy, or to prevent the spread of a conflagration, or, in virtue of some other imminent necessity, where the property itself is the cause of the public detriment), I think it would be depriving a man of his property without due process of law. The exceptions noted imply that the nature and cause of the taking are proper to be considered. The distress warrant issued in the case of Murray's Lessee et

al. v. Hoboken Land and Improvement Co. (18 How. 272) was sustained, because it was in consonance with the usage of the English government and our state governments in collecting balances due from public accountants, and hence was 'due process of law.' But the court in that case expressly holds that 'it is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial power, of the government, and cannot be so construed as to leave congress free to make any process, due process of law, by its mere will, p. 276. We think, therefore, we are entitled under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law' provided by the state law, when a citizen is deprived of his property; and that in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these, and if found to be suitable or admissable in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according to the laws, habits, customs, and preferences of the people of the particular state may require.

In this language by Mr. Justice Bradley is contained "all of the law and the prophets."

In the case of Scott v City of Toledo, 36 Fed, Rep., 385, Mr. Justice Jackson, in his admirable and exhaustive discussion of the question we are now considering, did not construe the language of Mr. Justice Miller as conveying the meaning which the Supreme Court of Iowa and the writer has placed upon the excerpts which we have quoted from Mr. Justice Miller's opinion. Mr. Elliott, in his work on Roads and Streets, however, adopts the construction which the Supreme Court of Iowa has adopted, and says in so many words that Mr. Justice Miller has held that the taking of private property for public use without compensation does not constitute a denial of due process of law.

It is not profitable to pursue this branch of the subject any further, in view of the later decisions of this court, our only excuse for having occupied so much space upon it is to show that the Supreme Court of Iowa evidently denied relief to the plaintiff in error because of the construction it gave to the above quoted language of Mr. Justice Miller. Upon the general question under discussion, we beg leave to call the court's attention to the above mentioned case of Scott v. City of Toledo, 36 Fed. Rep., 385. For the convenience of the court we will quote liberally from the excellent opinion in that case where all the authorities that we would otherwise quote ourselves are carefully and effectively marshalled by Mr. Justice Jackson. Commencing on page 391 he says:

"Consel for complainants, on this branch of the case, submit for consideration, upon the facts, two leading and general questions of law:

"(1) May municipal corporation appropriate private property for the purposes of a public highway, and compel the owner thereof to repay to the corporation, by an assessment upon his remaining property, not only the entire amount which it has paid him for the property appropriated, but also the costs and expense of ascertaining that amount, and the damages resulting to such remaining property from the taking of the property approriated? (2) May private property be appropriated for public uses, and a charge levied to pay therefor, without affording the person whose property is to be charged a time, place, or tribunal where he may be heard, before the liability for such charge is finally established, and the amount thereof definitely fixed?"

"Upon the first proposition it is insisted on behalf of complainants that compensation for private property taken for public uses is an essential element of that 'due process of law' without which the citizen cannot be lawfully deprived of his property. For the defendant it is claimed that 'the fourteenth amendment does not prohibit the taking of private property by a state without compensation;' in other words, that the appropriation of private property for public use, without compensation to the owner is not depriving him of his property 'without due process of law.' Counsel for defendant further say that, 'even if due process of law be held to require compensation, the kind

of compensation may still be determined by the state, and, in the absence of express constitutional provision to the contrary, the property may be compensated for in special benefits, and it is clearly within the province of the state to provide for estimating this compensation in any manner which involves due process of law,—that is, notice and a hearing.' We need not pause to consider this latter proposition. It is not material to the present case. It suggests a question not here involved, because it clearly appears from the pleadings, exhibits, and agreed statement of facts that no 'special benefits' will inure to complaints from the appropriation of their property, but, on the contrary, that it will result in damage to their remaining property. It would be an anomaly to say that property is specially 'benefitted' by the same act which damages it. A further reason for not discussing this last suggestion of defendant's counsel as to the right of the state to determine the kind of compensation that shall be awarded the owner for property taken for public use, is found in the fact that the action of the common council of Toledo herein called in question, as counsel for defendant admits, is not an attempt to pay for the property to be appropriated by the benefits resulting to other property from the appropriation. If such had been the true character of the proceeding, it would clearly violate the provisions of the state constitution, and, independent of the federal questions involved, would entitle complainants to enjoin its enforcement. The single question is therefore presented, whether, in the taking of private property for public use, due process of law' requires that compensation shall be

made to the owner for the property so appropriated. In other words, may a state, or any subordinate division thereof, since the adoption of the fourteenth amendment to the constitution of the United States, take the property of its citizen for public purposes without making him compensation therefor? Does 'due process of law,' without which the citizen cannot, under this fourteenth amendment, be deprived of his property by the state, involves as a necessary and essential ingredient the payment or the making of compensation for private property appropriated for public use? This precise question has not yet been passed upon, either by the Supreme Court or the United States or the State courts, so far as we have been able to discover, and it must therefore be considered and determined upon the general principles applicable to the subject.

"No attempt will be made to define the exact scope of the terms 'due process of law.' No court has yet succeeded in giving to these words an exact definition applicable to all the varied cases in which they may be involved. The Supreme Court has said (Davidson v. New Orleans, 96 U. S. 104) that, instead of attempting to define what constituted 'due process of law,' it was wiser, in ascertaining the extent and application of such an important phrase of the federal constitution, to adopt the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, and thus, by actual application, give to the words their proper meaning. In a general sense, 'due process of law' is identical in meaning with the phrase, 'law of the land,' as used in the con-

stitution of the several states. Cooley, Const. Lim., 432. As applied to the appropriation of private property for public uses under the power of eminent domain, 'due process of law' clearly does not mean mere legislative enactments, nor simple compliance with the forms of law, nor even constitutional provisions, if they be inconsistent with previously established legal rights. Thus in Cooley, Const. Lim , 433, it is said:

"That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense."

And again, (at p. 435).

"The principles, then, upon which the process is based, are to determine whether it is due process orn ot, and not any consideration of mere form. * * * When the government, through its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. * * * Due process of law, in each particular case, means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

To the same effect is the language of the Supreme Court in Davidson v. New Orleans, 96 U. S., 192, where the court, speaking by Mr. Justice Miller, after explaining the reasons why the phrase, 'law of the land,' as used in *magna charter*, was not directed against the enactments of parliament, proceeds to say:

"'But when, in the year of grace 1866, there is placed in the constitution of the United States a declaration that no state shall deprive any person of life, liberty or property without due process of law, can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law within the meaning of the constitutional provison.'"

"In this case of Davidson v. New Orleans, 96 U. S., 107, Mr. Justice Bradley said:,'

"If a state, by its laws, should authorize private property to be taken for public use, without compensation, * * * I think it would be depriving a man of his property without due process of law. * * * I think, therefore, we are entitled under the fourteenth amendment, not only to see that there is some process of law, but due

process of law, provided by the state law, when a citizen is deprived of his property; and that, in judging what is due process of law, respect must be had to the cause and the object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessments for local improvements, or none of these; and if found to be suitable or admissable in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive and unjust. it may be declared to be not due process of law.' "

"In the Kentucky Railroad Tax Cases, 115 U. S.. 331 6 Supt. Ct. Rep. 57, this language of Mr. Justice Bradley is quoted with approval of the Supreme Court. It is a fundamental principle of the common law, cstsblished and well settled before the adoption of the federal constitution, that the proper and lawful exercise of the sovereign right of eminent domain involves these two essential elements: viz., that the property must be taken for public benefit, or for public purposes, and that the owner must be compensaten therefor. The exercise of the power of eminent domain is, in legal effect, nothing more than an enforced sale for the public benent, at a fair price, to be ascertained in a proper mode, and to be paid the owner for the property so appropriated. This long and firmly established principle hardly requires any discussion or citation of authority in its support. It is thus clearly and forcibly expressed by one of the earliest and ablest law writers:"

" 'So great, moreover, is the regard of the law for pri

vate property, that it will not authorize the least violation of it, no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man or set of men to do this without consent of the owner of the land. * * * In this and similar cases the legislature alone can, and, indeed, frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price, and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform.' Cooley Bl. bk. 1, p. 137."

"In the same work, (book 2, p. 35, note) on the subject of 'Ways,' it is said:"

"'A public way is established either by the dedication of the owner of the land or by an appropriation of the land for the purpose by the sovereign authority, under what is called the right of eminent domain. When this right is exercised, it must be in pursuance of some express legislative authority which prescribes the formalities, and compensation must be made to the owner.'"

"So, too, in Mills. Em. Dom. § 1, it is said on this subject:"

"'The annals of all nations enjoying a constitutional government, and of many despotic nations, show that the moral sense of mankind requires such compensatisn. In the absence of provisions in the constitution, the courts have considered that the principle was so universal and fundamental that laws not recognizing the right of the subject to compensation would be void.'"

These well-recognized principles, vital to the security, and essential to the protection, of the citizen against the arbitrary exercise of power on the part of the government were in full force at the adoption of the constitution of the United States. They were not, however, fully recognized in that instrument as originally adopted. The fifth amendment, providing that private property should not be taken for public use without just compensation, was accordingly required for the better security of private property against the power of government. This amendment to the constitution, which recognized and secured to the citizen, as a fundamental principle, the right to compensation for private property taken for public use, was intended as a limitation to the federal power. The first ten amendments to the constitution recognized and secured to all citizens certain rights, privileges, and immunities essential to their security. The fifth amendment operating only as a limitation upon the power of the general government, fell short of giving to the citizen the full protection to which he was entitled in respect to his life, liberty and

property, so far as state action was concerned. It imposed no prohibition or limitation upon the power and authority of the states in dealing with the life, liberty and property of the citizen. They were left to the restraints of their several constitutions and respective laws on these subjects. So far as the states were concerned, citizens of the United States were thus left without adequate protection and security in their persons and property. The fourteenth amendment was adopted to remedy and correct this defect in the supreme organic law of the land. It involves no enforced or unreasonable construction to hold that this fourteenth amendment, as applied to the appropriation of private property for public uses, was clearly intended to place the same limitation upon the power of the states which the fifth amendment had placed upon the authority of the federal government. And as Judge Cooley well remarks:"

" 'Of these amendments it may be safely affirmed that the first ten took from the Union no power it ought ever to have exercised, and that the last three required of the states the surrender of no power which any free government should ever employ.'

" 'Whatever may have been the power of the states on this subject prior to the adoption of the fourteenth amendment to the constitution it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states cannot now lawfully appropriate private property for the public benefit or to

public uses without compensation to the owner; and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the state, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that due process of law required by said amendment. The conclusion of the court on this question is that since the adoption of the fourteenth amendment compensation for private property taken for public uses constitutes an essential element in due process of law, and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the federal constitution. There is no difference in the principle between the case put by Mr. Justice Miller, as an illustration, in Davidson v. New Orleans, 96 U. S., 102, viz., the taking of property from A, and vesting it in B., and the taking of property from an individual and vesting it in the public. 'Due process of law' is equally wanting in both cases; in the latter case, because such a taking, without making compensation to the owner, is nothing short of legalized robbery, or confiscation for the benefit of the public. If, therefore, the statutes of Ohio, whether in harmony with the state constitution or not, authorize the city of Toledo to appropriate the property of complain-

ants for the purpose of a public highway, and to do this in a way which will not only exempt it from duty and obligation of compensating them for the property taken, but imposes upon complainants themselves, under the form of an assessment by the foot front, the burden of compensating themselves or of returning to the city all they may be entitled to receive as compensation for their property, such statutes are wanting in that 'due process of law' required by the federal constitution: and the attempted proceedings had thereunder by the common council of Toledo are void, so far at least, as said assessment is concerned."

We apprehend, however, that the question whether the taking of private property for public use without compensation is a denial of due process of law is definitely settled by the decision of this court in the case of Chicago, B. & Q. Co. v. City of Chicago, 166 U. S., page 226, where the the question receives the most careful and exhaustive treatment. In the fourth sub-division of the syllabus in that case it is said:

"A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state, or under its direction for public use, without compensation made or secured to the owner, is wanting in the due process of law required by the fourteenth amendment' and the affirmance of such a judgment by the highest court of the state is a denial by the state of a right secured by the constitution."

In the opiniou in this case the leading authorities upon this subject are cited, and nothiug further is left to be said.

Having disposed of that part of this case which goes to the jurisdiction of this court on the ground that the taking of private property for public use constitutes a denial of due process of law it only remains to discuss the question whether or not there has actually been such denial in the case at bar, and whether the record in this case shows that the property of the plaintiff in error has been actually taken for public use without compensation.

It was contended by counsel for plaintiff in error in the state court that the said Agricultural Society is a private corporation. If this is true, then we have a case involving the taking of private property for private use, which if possible is more obnoxious to the "law of the land" than the taking for public use. As far as the principle at stake is concerned it matters not which view we take of the status of the Agricultural Society in this respect. White v. White, 5 Barbour, 484, 485. Had the plaintiff in error not executed and delivered an approved supersedeas bond long before this, doubtless, his sixty lots would have been sold to raise money to apply on the judgment against him for paving assessment. By the stipulation and demurrer it is conceded that said lots, if sold at their fair market value, wpule not have brought enough to pay the judgment.

This fact then is certain, the plaintiff in error would have been deprived of the entire ownership of his property. Now who did this act of alienation? It cannot be conceived that any one will claim that the plaintiff in error himself did it. The only answer possible to be made is that the plaintiff in error was deprived of his property by force of a contract made and enforced by the city council of the city of Des Moines.

The plaintiff in error has, without any fault or act of his own, been totally divested of his ownership. What compensation has he received? Who will have the hardihood to say that he has received, or in any manner can receive, directly or indirectly, a single farthing? Leaving out of sight that enormity, the personal judgment for a general execution to collect the deficiency, no subtlety of casuistry can cover up the fact that he has received, and will receive no compensation. Having received no compensation for this spoiletion of his property, what benefit has the plaintiff in error received? The record does not show that he owns any other real estate in the vicinity of Des Moines, and we think it is a fact that he does not The only benefit that can possibly be conceived is on the theory that the plaintiff in error is a self-denying philanthropist who receives delight in knowing that the good people of Polk county, Iowa, do not have to drive in the mud for at least one mile on their annual pilgrimages to the State Fair.

If the paving was not a wonton expenditure without use or benefit to any one, it follows that the general pub-

lic and the State Agricultural Society are the sole beneficiaries. The only constitutional ground for imposing any lien on the lots of the plaintiff in error is totally lacking in this case. I quote from the opinion of Mr. Justice Shepperd, in City of Raleigh v. Peace, 14 S. E., 525, (N. C.):

"We are of the opinion, however, that no personal judgment can be rendered against the abutting owner, and that so much of the amendment to the charter which provides for such a judgment is invalid. It is true that in Willmington v. Yopp, supra, such a judgment was rendered, but the point was not presented and passed upon by this court; the only question decided being the validity of special assessments of this character, and not the manner of their enforcement. We feel at liberty, therefore, to examine into the constitutionality of the act authorizing the judgment in question; and in doing so we cannot better express our views than by quoting the language of Mr. Elliott: 'It is not easy to perceive how the assessment can extend beyond the property against which it is directed, since the sole foundation of the right to direct and enforce the assessment rests upon the theory that the land receives a benefit equal to the assessment. If the land, with the super-added value given to it by the improvement, will not pay the assessment, there is no constitutional warrant for the right to seek payment of the assessment elsewhere, for the land is all that the improvement can by any possibility benefit, and land (or other property) that is not benefited can not be seized without

violating the principle which forbids the taking of property without compensation, nor without breaking down the only theory upon which it is possible to sustain local assessments. and yet if there is a personal liability the assessment may be enforced, although the land, even as enhanced in value by the improvement, may not be worth a tithe of the extent of making the improvement. * * * The decisions which declare statutes imposing a personal liabilty upon the land-owner unconstitutional are, in our judgment, so strongly entrenched in principle that they cannot be shaken. Elliott v. Roads and S., 400. Such, also is the opinion of Judge Cooley, (Taxation, 675), who says that 'in such a case, if the owner can have his land taken from him for a supposed benefit to the land which if the land is sold for the tax, it is thus conclusively shown he has not received, and he is then held liable for a deficiency in the assessment, the injustice—not to say the tyranny—is manifest. But such a case is liable to occur if assessments are made a personal charge; and cases like it in principle, though less extreme in the injury they inflict, are certain to occur.' The foregoing reasons are entirely conclusive in our minds, and are well sustained by authority.

Higgins v. Ausmuss, 77 Mo., 35 .

Neenan v. Smith, 50 Mo., 525.

Macon v. Patty, 57 Miss., 378.

Craw v. Tolono, 96 Ill., 255.

Gaffney v. Gough, 36 Cal., 104.

Baptist Church v. McAtee, 8 Bush, 508.

Burlington v. Quick, 47 Iowa, 226.
Green v. Ward, 82 Va., 324."

The third assignment of error by the plaintiff in error is as follows, record page 47:

"Third That the said judgment is not sustained or procured by due process of law, for the reason that Supreme Court of Iowa, in case of State ex rel. West v. City of Des Moines, 65 N. W. Rep., 818, has formally adjudged and decreed that the act of annexation under and by authority of which said paving tax was assessed is unconstitionnl and void, of which judgment this court will take judicial notice, and therefore all acts of the city officers by virtue oi said statute are void."

In the case above mentioned, the Supreme Court of Iowa held that the act under which the boundaries of the city of Des Moines were extended was void, because, although the act was drawn in the guise of a general law, it was in fact a special law for the reason that the city of Des Moines was the only city in the state of Iowa that possessed the conditions required by the act. If the act was void it seems impossible that the ordinances of the city council of Des Moines extending the boundaries of the city, under the void act, could have any vitality or validity. The stream cannot rise higher than its source. It seams to the writer that if this court will take judicial notice of the above mentioned decision of the Svpreme of Iowa the record shows that there was neither "due,"

nor in fact any process of *law* in the proceedings upon which the assessment was founded.

It is true that the Supreme Court of Iowa hold that by laches the state or any individual is estopped from attacking the validity of the subsequent act of corporation, or the validity of indebetness contracted for improve ments made thereunder, but this was grounded on doubtful expediency, which is not binding on this court. The decision of the highest court of the state of Iowa holding that the act of the legislature providing for annexation is void, would probably be binding on this court, but the policy of expediency announced by the court to avoid the logical and necessary results of its decision is not binding on this court, nor do we believe it is sustained by either authority or good reason.

Sultro v. Pettit, 74 Cal., 332.

Were not other questions which seem to be decisive of this case prescnted by the record, which have been fully discussed, it might be desirable to enter into a more extended discussion of this point, but as the case stands we do not feel justified, nor is it necessary to take up the further time of the court.

Respectfully submitted,

AMASA COBB,

ANDREW E. HARVEY.

IN THE

Supreme Court of the United States

Filed Jan. 23, 1899.

No. 128.

C. F. DEWEY,

Plaintiff in Error,

vs.

CITY OF DES MOINES ET AL.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

REPLY BRIEF OF PLAINTIFF IN ERROR TO THE SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

A. E. HARVEY,

Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 122.

C. P. DEWEY, *Plaintiff in Error,*
vs.
CITY OF DES MOINES, ET AL., *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

A. E. HARVEY, *Attorney for Plaintiff in Error.*

REPLY BRIEF OF PLAINTIFF IN ERROR TO THE SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

In the supplemental brief of defendant in error, counsel cites cases, not principles. The cases cited, when illumined by the light of the great principles underlying this question, will not bear the constructions sought by him to be made.

Between the position of counsel backed by the Iowa courts, and "the law of the land," there is a gulf which can not be bridged over.

To concede the position they have taken as correct would be to withdraw from the rights of property the guaranties of the constitution that private property shall not be taken for public use without compensation. The Iowa courts calmly proclaim that benefits to be received by the property owner is not a factor in support of the right of special assessments upon abutting property. It is sufficient if there shall be a resulting public benefit, however ruinous it be to the property owner who must bear the burden. It is boldly contended that all of his property abutting on the improved street can be appropriated, and if this will not be sufficient to pay the cost of the improvement, then by means of a personal judgment and a general execution, his farm (if he have one) in some other locality can be seized and sold to raise money to pay the deficiency.

It must not be overlooked that the conceded facts are that Mr. Dewey's lots were not worth the cost of the assessment, after the work had been done, and that the city council of Des Moines knew it when the work was ordered; that the work was ordered upon the sole solicitation of the State Fair Association and for its sole benefit. Of course, then there was no benefit that could possibly accrue to Mr. Dewey. The judgment of the Iowa Court contemplates the sale of all his lots, and then a general execution against him in order to raise the balance of the judgment.

The fact is the city council of Des Moines acted purely upon the peculiar conception of the Iowa courts that particular private property can be made to bear the burden of an improvement for the general benefit, regardless of any question of private benefit.

It seems scarcely necessary for me to point out the fact that all of the cases cited by counsel upholding the right of taxation, and that taxation is not a taking of private property for public use without compensation, is based upon, and contemplates, only *general* taxation, and presupposes that the burden will be shared by all the public alike. The author of Cooley on Taxation would have been amazed to find that he had been quoted to sustain the proposition that special assessments upon abutting property of owners who should bear the entire cost could be sustained on the general theory of taxation.

It would be unnecessary for me to cite authorities to this court, to sustain the proposition that all special assessments find their only justification in the fact that the property specially assessed will be improved in value, to the extent of the cost of the assessment.

The authorities cited by counsel in support of special assessments all go on the theory that there shall be a corresponding benefit to the property owner, and the arguments of all these cases are for the purpose of sustaining the right to make such an assessment *when there is a resulting benefit to the property owner*, such right having been denied in many cases. Counsel now seeks to make these cases apply in support of an assessment resulting in no benefit to the property owner and where, as in this case, it was never contemplated by the authorities imposing the burden that the work would be a benefit to him.

It is a gross perversion to seek to make such cases support the Iowa doctrine.

As to the decisions of this court upon the "conclusive presumptions" of benefits received by reason of the act of the legislature, which can not be questioned by the property owner, I will only repeat what I said in oral argument: "that this court evidently never contemplated that such a proceeding, as is disclosed by this record, should be attempted to be supported by a reliance upon Davidson vs. New Orleans, 96 U. S., 97, or Mobile County vs. Kimball, 102 U. S., 704, or Spencer vs. Merchant, 125 U. S., 345, and other cases cited by counsel for defendant in error.

The theory of counsel permits the taking of private property without a hearing, because the property owner will not be heard to contradict the "conclusive presumption" that his property has been benefited, even though, as in this case, it is admitted in the pleadings that the property owner is not benefited, but on the contrary that the assessment amounts to a confiscation of his property.

If the opinion of this court in Village of Norwood vs. Baker needed an example to prove the necessity of such a decision, it is surely furnished in the case at bar. What difference in principle can there be between a case where land was appropriated for a public road, and a case where the road being already opened, the adjoining land is appropriated to improve it. It seems absurd to call this the legitimate exercise of general taxing power.

I will close by briefly referring to counsel's claim that a Federal question was not raised in the Iowa court. That a Federal question was not first raised in plaintiff's bill is of no consequence. This court has repeatedly held that a

Federal question can be raised for the first time in the assignments of error in the supreme court of a state. It was done in this case. The supreme court of Iowa at some length discussed the question whether there was a denial of due process of law by the proceedings in this case, and that, too, without reference to the question of notice.

This court has held that due process of law requires that private property shall not be taken for public use without compensation. Therefore when the question of due process of law was raised, the lesser was included in the greater, and passed upon by the supreme court of Iowa. I see no force in counsel's position. If the guaranties furnished by the 14th amendment of the constitution of the United States were called to the attention of the supreme court of the state of Iowa, that court will be presumed to have done what it ought to have done, which was to carefully investigate and ascertain whether every right of the plaintiff in error prescribed by "due process of law" had been accorded to him in the proceeding shown by the record before it. The supreme court of Iowa in its opinion quoted from Davidson vs. New Orleans to show that "due process of law" had not been denied to plaintiff in error. How then can it be asserted that the question was not raised in the Iowa court?

A. E. HARVEY,
Attorney for Plaintiff in Error.